85-985

Supreme Court, U.S.
FILED
DEC 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOSEPH MASIN and EVA MARIA MASIN

Petitioners,

vs.

VINCENT DRAIN and RUTH DRAIN

Respondents.

---

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT, DIVISION SIX

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December, 1985

## QUESTION PRESENTED

How much discrimination is permissible under the Federal Fair Housing Act?

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Petitioners JOSEPH MASIN and EVA MARIA MASIN pray that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Second Appellate District, Division Six entered in this proceeding on May 29, 1985, review of which was

denied by the California Supreme Court on September 11, 1985.

## OPINION BELOW

The opinion of the Court of Appeal, unreported, appears in Appendix A. No opinion was rendered by the California Supreme Court in denying the petition for review.

## JURISDICTION

The judgment of the Court of Appeal was entered on May 29, 1985. A timely petition for review was denied by the California Supreme Court on September 11, 1985. This petition for certiorari was filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## STATUTORY PROVISION INVOLVED

United States Code, Title 42:

§ 3604. Discrimination in the sale

or rental of housing

As made applicable by section 803 [42 USCS § 3603] and except as exempted by sections 803(b) and 807 [42 USCS §§ 3603(b), 3607], it shall be unlawful --

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

## STATEMENT OF THE CASE

Petitioners EVA and JOSEPH MASIN are husband and wife. EVA is a German national and JOSEPH is a nationalized U.S. citizen from Czechoslavakia. In 1978, Petitioners decided to move from Cologne, Germany to Santa Barbara, California, and retained real estate brokers to find them a home. The brokers located an estate owned by Respondent RUTH DRAIN in Montecito, an exclusive and parochial community outside Santa Barbara. RUTH's husband

VINCENT DRAIN acted as his wife's agent in negotiating the sale of the estate.

Petitioners made an initial offer to purchase which Respondents rejected as too low and because Respondents wanted more information about "the Germans". The parties later agreed to split the difference in price, and attorneys were retained to resolve the tax implications of the sale.

After these issues were resolved and sale documents were prepared, the paperwork was submitted to Respondents for execution. A delay of several weeks ensued, during which Petitioners' real estate agents repeatedly contacted Respondents' agents. Petitioners' agents were informed that Respondents were refusing to sell to "those Germans", but that this did not represent a civil rights violation because civil rights "only applies to blacks".

Petitioners' agents later attempted to present the offer directly to Respondents. VINCENT DRAIN refused to accept it, stating that Respondent would not sell the estate to "those God damn Germans" and that Respondents were removing the residence from the market for sale that year.

Four days later Respondents sold the estate to a third party on terms virtually identical to those offered by Petitioners. Petitioners thereafter filed suit against Respondents and their real estate agents for, inter alia, violating the Federal Fair Housing Act.

A thirteen-day jury trial was presided over by a retired judge sitting by designation. Petitioners requested a jury instruction which provided: "EVA MASIN's national origin need not be the sole reason for defendants' conduct to make such conduct illegal if national

origin was an element of that conduct." The judge refused to give this instruction, and instead instructed the jury that: "EVA MASIN' national origin need not be the sole reason for defendants' conduct to make such conduct illegal if national origin was one significant factor in that conduct." A nine-to-three jury verdict was rendered in favor of Respondents.

In their post-trial motions, Petitioners argued that the jury instruction represented an improper interpretation of a federal statute as the Federal Fair Housing Act provides that national origin may not play any role in a decision to refuse to provide housing. The motions were denied by the

trial court and this appeal followed.[1]

The California Court of Appeal upheld the trial court. The Court of Appeal recognized that there is a distinction between the standard proposed by Petitioners and that adopted by the trial court, but it characterized that distinction as one not "sufficiently significant" to assign error. The California Supreme Court apparently agreed with this analysis as it denied the petition for review.

## REASONS FOR GRANTING THE WRIT

### 1. THIS CASE PRESENTS AN IMPORTANT QUESTION OF NATIONAL SIGNIFICANCE IN THE AREA OF FEDERAL CIVIL RIGHTS LAW.

The question presented in this

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1. While Petitioners also assigned error to the improper admission of certain evidence, it is their position that had the correct instruction been given, the admission of that evidence would have been merely harmless error. Thus, it cannot be said of this case that the judgment rests on adequate non-federal grounds despite the presence of a substantial federal question.

Petition is simple, yet of nation-wide significance. Unfortunately, the answer is not so simple, as evidenced by the results reached by the various courts, both federal and state, which have grappled with the problem.

The issue which this Court is requested to resolve is whether discrimination need only be "a factor" in a defendant's refusal to provide housing, or whether it must be "a substantial factor" before liability can be imposed.[2/] Petitioners submit that the distinction between the two standards is critical because the latter standard permits "partial discrimination" and

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2. A third standard was also discussed by the California Court of Appeal: Whether discrimination must be "a motivating factor." Petitioners submit that "a motivating factor" and "a factor" are in essence the same standard, and that they each represent a standard quite different from that of "a substantial factor."

allows a defendant to escape liability by claiming that even though he was motivated by bigotry, other factors contributed more heavily to his decision and thus were more "significant."

Whichever standard is ultimately adopted by this Court will have far-reaching effects. Not only will there finally be a uniform standard for application of the Fair Housing Act, but that standard can be extended into related areas, such as age and employment discrimination. The result will be a coherent, consistent administration of federal civil rights laws from the elitist communities of southern California across the country to the rural south and on up to the industrial cities of the Northeast.

2. THE DECISION BELOW CONFLICTS WITH THE PRINCIPLES ARTICULATED BY THIS COURT IN ARLINGTON HEIGHTS.

Nearly ten years ago, this Court ren-

dered its decision in Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977). In discussing the difficulty of determining whether a legislative body had been motivated by discrimination, the Court noted that judicial deference to legislative decisions is inappropriate "[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision" (Id., at 265-66, emphasis added).

This Court has not yet directly faced the precise issue presented in this Petition. However, under the reasoning of Arlington Heights, a plaintiff need not prove that a defendant's refusal to sell or rent was based solely on discriminatory motives, nor must the plaintiff show that such motives represented a "substantial factor" in the defendant's decision. Instead, the plaintiff need

only demonstrate that discrimination was "a motivating factor" in order to prevail.

The time is now ripe for this Court to clarify that the position taken in Arlington Heights is the law of the land. If that standard is adopted, results such as that in the instant case, where a trial judge is permitted to capriciously "shop" for a standard which appeals to his personal views, will be avoided. More importantly, all will know that discrimination, in whatever form and to whatever degree, will not be tolerated, and the way will finally be paved for its total eradication.

3. THE DECISION BELOW CONFLICTS WITH THOSE OF THE VAST MAJORITY OF CIRCUIT COURTS OF APPEAL.

Numerous Circuit Courts of Appeal have followed the lead set by this Court in Arlington Heights and have held, in

one form or another, that discrimination may not be a factor in a refusal to sell or rent property.[3/] Thus, it can safely be said that this represents the "majority rule."

In contrast is the Fifth Circuit Court of Appeal, the only circuit which has adopted the "substantial factor" test which was followed by the trial court in the instant case. This standard was first enunciated in United States v. Pelzer Realty Co., Inc., 484 F.2d 438 (5th Cir. 1973), cert. denied, 416 U.S. 936 (1974), where it is set out

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3. See, e.g., Atkins v. Robinson, 733 F.2d 318 (4th Cir. 1984); United States v. City of Parma, Ohio, 661 F.2d 562 (6th Cir. 1981), cert. denied, 456 U.S. 926 (1982); Jordan v. Dellway Villa of Tenn., Ltd., 661 F.2d 588 (6th Cir. 1981), cert. denied, 455 U.S. 1008 (1982); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032 (2nd Cir. 1979); United States v. Mitchell, 580 F.2d 789 (5th Cir. 1978); Smith v. Sol D. Adler Realty Co., 436 F.2d 344 (7th Cir. 1971).

with no supporting authority (Id., at 443). Significantly, not all decisions in that circuit have followed it, thus implying that it may have been either implicitly disapproved or dictum. (United States v. Mitchell, supra at note 3; but see, Woods-Drake v. Lundy, 667 F.2d 1198, 1202 (5th Cir. 1982).

There is thus a square and irreconciliable conflict between the Fifth Circuit and every other Circuit which has considered the issue. Until this Court definitively states what standard must be met to establish a violation of the Act, courts will continue to arbitrarily apply whichever test suits their fancy. Thus, a defendant who commits the identical act of discrimination in two jurisdictions will be guilty of violating federal law in one and will be absolved in the other, a truly absurd result.

4. THE DECISION BELOW SANCTIONS ILLEGAL DISCRIMINATION, ENCOURAGES VIOLATIONS OF CIVIL RIGHTS, AND UNDERMINES THE POLICIES BEHIND THE FAIR HOUSING ACT.

The Fair Housing Act states that "it is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States" (42 U.S.C. § 3601). The Act was adopted to implement a policy "to which Congress has accorded the highest national priority," the elimination of all discrimination (United States v. Henshaw Bros., Inc., 401 F.Supp. 399, 402 (E.D. Va. 1974)). "All discrimination" includes "partial discrimination" (Smith v. Sol D. Adler Realty Co., supra, at note 3, 349-50).

To require that discrimination be "significant" before liability can be imposed subverts the purposes of the Act; it allows a person who admittedly is motivated by prejudice to escape

liability if he can show that other factors also contributed to his decision. Petitioners respectfully submit that Congress never intended that the legal repercussions of bigotry could be so easily evaded.

5. CERTIORARI SHOULD BE GRANTED TO DISCOURAGE UNNECESSARY LITIGATION AND TO FINALLY RESOLVE THIS RECURRING PROBLEM.

Until this Court adopts a uniform standard, the Act will continue to be interpreted in a capricious and idiosyncratic manner by both federal and state courts. Some courts will continue to find that the presence of any amount of discrimination gives rise to liability, even if the defendant proves that he was also motivated by other, legitimate factors. Other courts will require that discrimination be the obvious and exclusive reason for the defendant's refusal, while still others will require

the trier of fact to "weigh" the discriminat. . .o determine whether it is "significant."

Even if the Court does not agree with Petitioners' position, the issue should nevertheless be resolved, if for no other reason than basic principles of fairness. It is submitted that there are other attorneys in the country who, like Petitioners' counsel, conclude their clients have a viable claim for violation of the Act under the "majority rule." These attorneys and their clients should be spared the surprise of discovering at trial that a much more stringent standard of proof must be met, a standard which is arbitrarily chosen by a trial judge who believes "some" discrimination is acceptable so long as it is not "significant." Thus, if a clear, consistent test as to what constitutes a violation is delineated,

needless litigation could be reduced, if not eliminated entirely.

6. THE DECISION BELOW IS INCORRECT AND RESULTED IN A MISCARRIAGE OF JUSTICE.

As there was no uniform standard to provide guidance as to how the Act should be construed, the trial court in this action chose to follow the dubious course set by the Fifth Circuit. In response to Petitioners' argument that the jury instruction represented reversible error, the trial judge justified his decision on the basis of his personal views:

> "Your argument about the significant factor is certainly a highly debateable [sic] subject but I am inclined to feel that there is a lot to be said in support of the the position taken by the Circuit Court in stating that the discrimination must be a significant factor. If you stop and think for a moment that bias is a human trait that permeates all of us, it runs all through society, it's practically impossible to eliminate bias from the whole human context. Therefore, it seems to be logical

> for the Circuit Court to suggest that in trial to determine the rights of people, depending on whether there was bias involved, the bias must at least be identifiable and it must be a substantial or significant factor in determining the outcome; otherwise, there would be no way of detecting this insidious infection called bias that permeates all of human life."

This is precisely the type of reasoning which necessitated the adoption of the Act. While it may be true that bias is practically impossible to eliminate from life, that does not justify a refusal to enforce a law which was designed to accomplish exactly that.

Had the trial court correctly construed the Act, Petitioners would have prevailed. There was evidence, both direct and circumstantial, which established that Petitioners' national origin played a role in Respondents' refusal to sell. Thus, the jury could have accepted Petitioners' case in toto

as true, yet still rendered a verdict for Respondents. It is submitted that the jury did precisely that, thus implicitly sanctioning the violation of Petitioners' civil rights.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal.

Respectfully submitted,

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A. BARRY CAPPELLO,
Of Counsel

# APPENDIX

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

| | | |
|---|---|---|
| JOSEPH MASIN and EVA MARIA MASIN, husband and wife, et al., | ) | 2d Civil No. B-002033 |
| | ) | (Super. Ct. No. 124420) |
| Plaintiffs and Appellants, | ) | (Santa Barbara County) |
| v. | ) | |
| VINCENT DRAIN and RUTH DRAIN, husband and wife, et al., | ) | |
| Defendants and Respondents. | ) | |

Joseph Masin and Eva Maria Masin appeal from a judgment by jury verdict in favor of Vincent Drain and Ruth Drain, respondents herein and defendants in the lower court. The lawsuit followed a complaint filed by Masins and their real estate broker, Bob Jones (Bob

Jones Realty) against Drains and their real estate broker Arthur Bromfield (Sears Realty) for housing discrimination, fraud, breach of contract, and declaratory relief. At trial, the court allowed Masins to add an additional cause of action for conspiracy. The trial court had previously entered summary judgment in favor of defendants on the causes of action for breach of contract and declaratory relief which this court affirmed on appeal in Jones v. Drain (1983) 149 Cal.App.3d 484 and Masin v. Drain (1984) 150 Cal.App.3d 714.

Appellants allege the trial court both erroneously instructed the jury on discrimination as a factor in rejecting an offer and admitted into evidence a letter written by Ruth Drain's tax attorney. We find no error and affirm the judgment.

## FACTS

Viewed in the light most favorable to the judgment, the record reflects that April 12, 1978, Ruth Drain signed an exclusive listing agreement with Sears Realty to sell her Santa Barbara residence for $775,000, all cash. In the summer of 1978, Masins made an offer of $700,000 which Drains refused.[1/] Further negotiations resulted in a proposed option to purchase to be executed in 1978 but not exercised until after January 1, 1979, in order to avoid adverse taxes in 1978. The option price was to be applied to the purchase price, and escrow would not open prior to January 1, 1979.

Mr. Hay testified that he met with Mrs. Masin and her brokers August 4,

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1. Although Mrs. Drain owned the house, Mr. Drain was included in some discussions.

1978, to discuss the restructuring of their offer and that several days later, after conferring with Masins' attorney, Anthony Romasanta, received the option and contract from Romasanta, which he forwarded to his client. Because Hay was concerned that the option agreement might appear a sham to the tax authorities, he also advised the Drains to consult a tax attorney in Texas where they were living.[2/] Additionally, he mentioned possible tax problems with the offer from another party, David Boggs. The Drains consulted a tax attorney in Texas who wrote to Hay. Mrs. Drain told Hay that she was rejecting Masins' offer for the tax reasons he and her tax attorney had mentioned.

Hay testified further that he reduced

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2. Apparently Mrs. Masin had signed both the option and the sales contract attached to it.

to writing August 29, 1978, an oral offer from David Boggs which Ruth Drain had accepted August 24. Boggs had offered the full cash price of $775,000 with an option payment of $100,000 and a sale delayed to early 1979. Masins' offer had been $735,000.

The thrust of appellants' evidence at trial was that Masins' brokers had been led to believe through Drains' attorney and brokers that their offer of $735,000 had been accepted and that the Drains had refused to sell the property to "the German," Mrs. Masin, for the sole reason

that she was German.[3]

## DISCUSSION

### 1. Adequacy Of Instructions Regarding The Fair Housing Act.

Appellants instituted action for discrimination pursuant to the Fair Housing Act, which provides in pertinent part: ". . . [I]t shall be unlawful--(a) to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale

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3. Appellants have not raised the issue of substantial evidence but nevertheless argue that "all reasonable inferences lead to the conclusion that the last-minute sale to Boggs on identical terms was concocted for the purpose of selling . . . to a person of national origin more acceptable to the Drains" and that there is "overwhelming evidence in the record that a verdict would have been rendered in favor of the Masins had not the improper instruction been given." Assuming we could reweigh the evidence, we would refuse to do so on this selectively designated record. Suffice it to say that the evidence was in conflict and there is substantial evidence in the record before us to support the judgment.

or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin." (42 U.S.C. § 3604.) In addition to instructing the jury in the words of the statute, the trial court gave the following instructions: "If you find that after Mrs. Masin made a bona fide-that is, a good faith-offer to purchase the property owned by Mrs. Drain at 830 Picacho Lane either Vincent Drain or Ruth Drain or both of them refused to sell or to negotiate for the sale or otherwise made that property unavailable to Mrs. Masin because of her national origin, then the defendant or defendants who did so are subject to liability for damages sustained by the plaintiffs. [¶] The mere listing of property for sale does not obligate the owner to sell the property to a prospective purchaser who

does not offer to buy it on the terms stated in the listing. Until an offer conforming to the terms of the listing is made, the owner may terminate the listing without liability to any prospective purchaser. This, however, does not authorize an owner to refuse to accept a bona fide offer or to negotiate with a prospective buyer because of the national origin of the person making the offer or seeking to negotiate for the purchase of the property. [¶] In order to be a violation of the statute I have read to you, it is not necessary that refusal of the owner to sell or negotiate for the sale of a dwelling house because of the national origin of the prospective buyer be the only reason. It is a violation of law if national origin is <u>one significant factor</u> in rejecting an offer that meets the terms on which the owner is willing to sell."

(Emphasis added.)

Appellants take umbrage with the underlined portion of the last sentence in the quoted instruction. They contend the trial court should have accepted their version of the instruction which read, in pertinent part, ". . . make such conduct illegal if national origin was an element of that conduct." (Emphasis added.) The trial court obtained the phrase "one significant factor" from United States v. Pelzer Realty Company, Inc. (5th Cir. 1973) 484 F.2d 438 wherein the court stated: "We need not and do not find that racial prejudice dominated Thames' mind during the negotiations. It is enough that race was one signficiant factor he considered in his dealings with the men. Defendants and their attorney continually reiterated Thames' concern with his financial investment in the unsold

houses in Seth Johnson Estates. We do not doubt that his primary goal was to make money, not to violate the Fair Housing Act. But it is not necessary to show that Thames intended to deprive Barnett and Marshall of rights granted by the Act. A violation occurred because his words had that effect."

Appellants assert that the phrase "one significant factor", which has been repeated consistently in Fifth Circuit cases is an impermissible standard, and that the states which comprise that circuit are not famous for their zealous protection of civil rights. Instead, appellants further argue, the trial court should have adopted, and this court should espouse, the more "liberal" phrase, "an element", which appellants took from Zuch v. Hussey (E.D. Mich. 1975) 394 F.Supp. 1028, 1047. Appellants' interpretation of the cases

involving alleged violations of the Fair Housing Act is misfocused.

Zuch v. Hussey, supra, held that the Fair Housing Act of 1968 (42 U.S.C. 3601, et seq.) should be liberally conthe purchaser which the Act protects. (394 F.Supp. at 1047.) It then cited Williamson v. Hampton Management Company (1972) 339 F.Supp. 1146 (Ill.) for the proposition that race need not be the sole reason for the decision to refuse to sell or rent if it is an element in that decision. That case, however, cited Smith v. Sol D. Adler Realty Company (7th Cir. Ill. 1971) 436 F.2d 344 for that proposition and Smith v. Sol D. Adler Realty Company did not use the phrase "an element" at all. What Smith v. Sol D. Adler Realty Company said was that "[r]ace is an impermissible factor in an apartment rental decision and it cannot be brushed aside

because it was neither the sole reason for discrimination nor the total factor of discrimination. We find no acceptable place in the law for partial racial discrimination." (Id., at 349-350, emphasis in the original.)

In order to assay the propriety of the trial court's choice of phrases, it is helpful to look to Arlington Heights v. Metro. Housing Corp. (1977) 429 U.S. 252 where a real estate developer sued a municipality, alleging that its refusal to rezone land on which he intended to build low-and moderate-income housing was racially discriminatory in violation of the Fair Housing Act. The United States Supreme Court held that when there is proof that a discriminatory purpose has been a motivating factor in a decision of legislators or administrators, judicial deference is no longer justified, and that proof that a

rezoning denial was motivated in part by a racially discriminatory purpose will not necessarily require invalidation of the challenged decision, but will shift the burden of establishing that the same decision would have resulted. (Id., at pp. 265-266.)

Cases involving the Fair Housing Act, as appellants correctly indicate, are not consistent in their terminology. Many Fifth Circuit cases continue to use "a significant factor" or "one significant factor", e.g., Woods-Drake v. Lundy (1982) 667 F.2d 1198 which lists other cases using that phrase. Other courts use "a motivating factor" or "competing consideration", e.g., Atkins v. Robinson (DCA Va. 1982) 545 F.Supp. 852; United States v. City of Parma, Ohio (1981) 661 F.2d 562; United States v. City of Birmingham, Mich. (1982) 538 F.Supp. 819. Still others employ the terms "a

part", "any part", "a consideration", "some role", or "an element", e.g., Bishop v. Pecsok (Ohio 1976) 431 F.Supp. 34; Jordan v. Dellway Villa of Tenn., Ltd. (6th Cir. 1981) 661 F.2d 588; United States v. Mitchell (5th Cir. 1978) 580 F.2d 789, 791; Zuch v. Hussey, supra, 394 F.Supp. 1028; Shaw v. Cassar (E.D. Mich. 1983) 558 F.Supp. 303.

A close reading of the cases cited reveals that almost all hark back to Smith v. Sol D. Adler Realty Company, supra, or more recently to Arlington Heights, supra. Moreover, the pervasive theme in all the cases (even those in the suspect Fifth Circuit) is that race is an impermissible consideration in a real estate transaction (Moore v. Townsend (7th Cir. 1975) 525 F.2d 482, 485) and that race need not be the sole motivating factor in a denial that has discriminatory effect in order

for plaintiff to succeed in a claim under the Fair Housing Act (Robinson v. 12 Lofts Realty, Inc. (2nd Cir. N.Y. 1979) 610 F.2d 1032, 1042). A denial violates the statute if race is even one of the motivating factors. (Ibid.)

Although we find the phrase "a motivating factor" more consistent with the United States Supreme Court's holding in Arlington Heights and preferable to either "an element" or "one significant factor", we do not find the distinction among the three phrases sufficiently significant to assign error to the trial court's choice. The trial court fully and fairly instructed the jury in the applicable law and the instruction in question did not lead to a miscarriage of justice. (Cal. Const., arts. VI, § 13; see Henderson v. Harnischfeger Corp. (1974) 12 Cal.3d 663, 674.)

2. Admissibility Of The Tax Attorney's Letter.

During the trial, John Hay read to the jury the letter written by Drains' tax attorney, Emery, which advised the Drains against accepting Masins' offer because of adverse tax consequences that year. Hay testified that after reviewing Masins' offer, he became concerned that it would not solve the tax problem and that he wrote to the Drains and advised them to consult a tax expert. The trial court admitted into evidence, and allowed to be read to the jury, both the letter from Hay to Drains and the letter from Emery to Hay explaining what he had advised the Drains. Hay also testified that he discussed Emery's letter with Mrs. Drain. The letters were admitted for the limited purpose of proving that the letters were sent. Appellants objected

to the Emery letter on the grounds of relevancy, hearsay, and undue prejudice.

Appellants contend the letter was inadmissible hearsay and unduly prejudiced them because a juror stated by affidavit that members of the jury referred to that letter as a factual and accurate interpretation of the tax consequences if Mrs. Drain had accepted Masins' offer.[4/] Appellants raised this point in their motion for new trial which the trial court denied.

Hearsay is defined as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code § 1200, subd. (a).) The Emery letter was not hearsay. It was not offered to

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4. This juror was one of three who did not join in the verdict for respondents.

prove that Emery's analysis of the impact on his clients' taxes if Mrs. Drain accepted the offer was correct, but only that she believed that to be the case and that such statements were made to her. (Stewart v. Estate of Bohnert (1980) 101 Cal.App.3d 978, 990.) As stated in Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal.3d 98, 109, "'[t]here is a well-established exception or departure from the hearsay rule applying to cases in which the very fact in controversy is whether certain things were said . . . and not . . . whether these things were true or false, and in these cases the words . . . are admissible not as hearsay, but as original evidence.' [Citations.]" The letter was highly relevant on the issue of whether Mrs. Drain refused to sell her residence to Masins because of racial reasons or tax reasons, and even

if hearsay, would have been admissible for the limited purpose for which the trial court admitted it. "It is well established that a statement by the declarant may be admitted if it tends to show the mental state or attitude of the person who heard it or read it." (Stewart v. Estate of Bohnert, supra, 101 Cal.App.3d 978, 990.)

Appellants do not directly claim jury misconduct but mention it obliquely with reference to the jury's allegedly considering the Emery letter for the truth of the matter stated. Assuming there was jury misconduct (and we specifically do not make such a finding), it is not prejudicial per se. (People v. Sutter (1982) 134 Cal.App.3d 806, 820.) Appellants concede in both opening and reply brief that if the jury was instructed correctly concerning the standard for unlawful discrimination,

the error in admitting the Emery letter would be at most harmless or nonprejudicial. We find that the jury was instructed correctly and that error, if any, in admitting the letter was harmless.

3. Law Of The Case.

Respondents urge us to find that our prior decisions in Jones v. Drain, supra, 149 Cal.App.3d 484 and Masin v. Drain, supra, 150 Cal.App.3d 714 are law of the case. In Masin v. Drain, we held that the Drain property was effectively removed from the market due to Ruth Drain's oral acceptance of the Boggs offer before the receipt of Masins' offer of August 26 and August 28. Respondents contend that it therefore follows that there could be no unlawful discriminatory refusal to sell to them. Appellants, on the other hand, argue that factual differences brought out at

trial should prevent application of that doctrine against them but that strict application of the rule of law of the case mandates judgment in their favor.

The doctrine of "law of the case" requires that both trial and reviewing courts follow principles laid down upon a former appeal in the same case, whether the earlier holdings are right or wrong. (Lindsey v. Meyer (1981) 125 Cal.App.3d 536, 541.) Generally, the doctrine does not extend to points of law which might have been but were not presented and determined in the prior appeal. (Estate of Horman (1971) 5 Cal.3d 62, 73.) Where, however, a particular point was essential to the decision, and the appellate decision could not have issued without its determination, the point will be held impliedly decided, even though not raised by counsel or expressly mentioned

in the prior appeals. (Lindsey v. Meyer, supra, at 541.)

Nevertheless, the doctrine does not give any conclusive effect to determinations of questions of fact unless additional evidence presented at the subsequent proceeding is merely cumulative to evidence of the same class given on the first appeal. (See Estate of Baird (1924) 193 Cal. 225, 234, 244, 245; 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 637, p. 4561.)

Because of additional evidence regarding the early August negotiations, we examined the issues raised on their merits instead of applying the law of the case and, in doing so, have concluded that our decisions in the former appeals were correctly determined. Contrary to appellants' assertions, the record does not compel us to find as a matter of law that Masins had

an oral contract with Drains before Mrs. Drain accepted the Boggs offer. To paraphrase the reviewing court in Duckett v. Silberman (2d Cir. 1978) 568 F.2d 1020, 1024, of crucial significance, where credibility as to rejection of the Masins' offer is an important factor, we decline to second-guess the jury in a case which is essentially factual. They were there. We were not.

4. Attorneys' Fees.

Respondents request attorneys' fees for defending this appeal under our ruling in Jones v. Drain, supra. In Jones v. Drain, we ruled that Bob Jones Realty was required to pay the Drains' attorneys' fees since Bob Jones Realty had requested those fees in its complaint and allegedly would have been entitled to them had it prevailed. The Masins, however, neither pleaded nor alleged they were entitled to attorneys'

fees from the Drains since there was no contract to which they were both parties which contained a provision for attorneys' fees. Therefore, respondents' request is denied.

The judgment is affirmed, each party to bear its own fees and costs on appeal.

NOT TO BE PUBLISHED.

STONE, P.J.

We concur:

GILBERT, J.

ABBE, J.

John W. Holmes, Judge*
Superior Court County of Santa Barbara

---

Goux, Romasanta & Cappello, A. Barry Cappello and Frances E. Komoroske for

Plaintiffs and Appellants.

Simon & Sheridan and Wilfred A. Hearn, Jr., for Defendants and Respondents.

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*(Retired Judge of the superior court sitting under assignment by the Chairman of the Judicial Council.)

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOSEPH and EVA MARIA MASIN, Petitioners,

v.

VINCENT and RUTH DRAIN, Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of December, 1985, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Wilfred A. Hearn, Jr., Esq., Simon and Sheridan, 2404 Wilshire Boulevard, Ste. 400, Los Angeles, California, 90057, Counsel for the Respondents. I further certify that all parties required to be served have been served.

FRANCES E. KOMOROSKE
831 State Street
Santa Barbara, CA 93101
Counsel for Petitioners

Supreme Court, U.S.
FILED
JAN 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-985

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

JOSEPH MASIN and EVA MARIA MASIN,

Petitioners,

vs.

VINCENT DRAIN and RUTH DRAIN,

Respondents.

---

# RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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January, 1986

BEST AVAILABLE COPY

## QUESTION PRESENTED

Is it error as a matter of law, in an action alleging housing discrimination under the Federal Fair Housing Act, 42 U.S.C. §3601 et seq., to give a jury instruction that states discrimination must be one "significant factor" to impose liability rather than an instruction that states discrimination must be a "motivating factor" to impose liability (as was approved by this Court in Village of Arlington Heights v. Metropolitan Housing Dev. Corp.)

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No. 85-985

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOSEPH MASIN and EVA MARIA MASIN

Petitioners,

vs.

VINCENT DRAIN and RUTH DRAIN

Respondents.

---

RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

---

Respondents Ruth Drain and Vincent Drain respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the California Court of Appeal, Second Appellate District.

STATEMENT OF THE CASE

On April 12, 1978 Respondent Ruth

Drain entered into an exclusive listing contract with Sears Realty to sell her home in Santa Barbara County for $775,000. Respondent Vincent Drain, husband of Respondent Ruth Drain, had no ownership in the home and no legal authority to sell the home.

On July 28, 1978, Petitioners, through their real estate broker, Bob Jones Realty, made an offer to purchase the home for $700,000. The offer was rejected because it was insufficient in price and because the terms of the sale had negative tax consequences for Respondents.

Respondent Ruth Drain was concerned about the tax ramifications of a sale of the home in 1978 and required that any offer to purchase meet the following conditions: (1) an option to purchase would be executed, to be exercised on or after January 1, 1979; (b) option price would

be $100,000 cash, to be applied to the purchase price; (3) escrow would not open prior to January 1, 1979; and (4) all documents would be prepared by attorneys for Ruth Drain and approved by Sears Realty and Ruth Drain's tax attorneys.

On August 24, 1978, Respondent Ruth Drain met with David Boggs who offered to purchase the property for $775,000 and agreed to the terms and conditions as set forth above. Respondent Ruth Drain and Mr. Boggs entered into an oral contract for the sale of the home, and also agreed to reduce the contract to writing on August 29, 1978. The agreement was reduced to writing and the sale was completed.

On August 26, 1978 and August 28, 1978, Bob Jones Realty, on behalf of Petitioners, presented another offer to Respondent Ruth Drain which was rejected because Respondent Ruth Drain had already

accepted Mr. Boggs' offer.

Petitioners thereafter filed suit against Respondents and their real estate agents for, among other things, violating the Federal Fair Housing Act.

Respondents and real estate agents moved for partial summary judgment which was granted. Petitioners appealed that grant to the same District Court of Appeal which, in a separate opinion, affirmed the grant of summary judgment. A copy of said opinions are included herein as Appendix A and B. No review of said decisions was sought.

Thereafter the case proceeded to trial on the balance of the complaint. At trial, the only offers that were tried under the Federal Fair Housing Act were Petitioners' offers of August 26, 1978 and August 28, 1978.

During trial both Ruth Drain and Vincent Drain testified but their testi-

mony was not transcribed and not made a part of the record on appeal.

Petitioners brought up less than a full record on appeal. When Respondents attempted to augment the record on appeal, Petitioners opposed it and the court denied Respondents' motion without prejudice. Thus, the appeal was on less than a full record.

After trial, a nine to three jury verdict was rendered in favor of Respondents.

On appeal, Petitioners claimed error with respect to the trial court's instruction to the jury that "[i]t is a violation of law if national origin is one significant factor in rejecting an offer that meets the terms on which the owner is willing to sell."

The California Court of Appeal for the Second Appellate District upheld the jury verdict. While the District Court

of Appeal found the phrase "a motivating factor" more consistent with this Court's holding in Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977), and preferable to either "an element" or "one significant factor", it also found that the distinction among the three phrases was not sufficiently significant to assign error to the trial court's choice.

The California Supreme Court denied Petitioners' petition for review.

## REASONS TO DENY WRIT

### 1. THE ISSUE AS PRESENTED TO THIS COURT BY PETITIONERS WAS NOT RAISED IN THE DISTRICT COURT OF APPEAL AND THUS NEVER ADDRESSED

At page 8 of Petitioners' Petition, Petitioners state "[t]he issue which this Court is requested to resolve is whether discrimination need only be 'a factor' in a defendant's refusal to provide housing, or whether it must be a

substantial factor' before liability can be imposed."

On appeal, however, Petitioners contended only that the trial court erroneously instructed the jury when it stated "[i]t is a violation of law if national origin is one significant factor in rejecting an offer that meets the terms on which the owner is willing to sell."

At no time did Petitioners raise the issue as to the use of a "substantial factor" on appeal.

2. PETITIONERS DO NOT PROPERLY REQUEST THIS COURT TO REVIEW THE DECISIONS BELOW

In their amended complaint in the cause of action dealing with housing discrimination, Petitioners alleged discrimination with respect to their offers to purchase of August 26 and 28, 1978.

During trial on this cause of action, the offers tried as to the alleged basis of liability were the offers of August

26 and 28, 1978.

Yet, according to Petitioners' Statement of the Case, Petitioners have shifted to a different offer which they never claimed was rejected on grounds of discrimination and thus was not even tried at the trial court level.

This different offer only became an issue in the District Court of Appeal after Respondents had filed their opposition brief. This different offer did not meet the terms required by Respondent Ruth Drain and was never the subject of a claim of discrimination under the Federal Fair Housing Act.

Thus, the petition seeks a review of a rejected offer which was never alleged in the complaint nor tried in the trial court but was addressed by the appellate decision.

3. THE DISTRICT COURT OF APPEAL DECISION IS NOT IN CONFLICT WITH THE PRINCIPLES SET FORTH BY THIS COURT IN ARLINGTON HEIGHTS

In Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977), a real estate developer sued a municipality because of its alleged refusal to rezone land on which the developer intended to build low and moderate income housing. The developer alleged that the municipality's conduct was racially discriminatory in violation of the Fair Housing Act. This Court noted that when there is proof that a discriminatory purpose has been a motivating factor in the decision, judicial deference to legislative decisions is inappropriate.

Petitioners allege that the District Court of Appeals' countenance of "significant factor" in place of "motivating factor" as used by this Court

renders the District Court of Appeal decision in conflict with this Court's decision in Arlington Heights.

Since there are no relevant reported decisions which specifically define the words "factor," "motivating," "significant," or "substantial," reference is made to Webster's New Collegiate Dictionary for the meaning of these words.

"Factor" is defined as ". . . 2 a: something that actively contributes to the production of a result: ingredient . . . ." "Active is defined as ". . . 1 : characterized by action rather than by contemplation or speculation . . . ." "Contribute" is defined as ". . . b: to play a significant part in bringing about an end or result . . . ."

"Significant" is defined as ". . . 3 a: having or likely to have influence or effect: important, weighty b :

probably caused by something other than mere chance . . . ."

"Motive" is defined as ". . . 1 : something (as a need or desire) that causes a person to act . . . ."

"Substantial" is defined as ". . . 1 a : consisting of or relating to substance . . . c : important, essential . . . ." (Emphasis added.)

As can be seen from the definitions of these words, a common theme of cause and effect runs through these words. Likewise, this common theme is present when the words are combined in the phrases "motivating factor", "significant factor" and "substantial factor."

There does not appear to be a clear distinction or definitional difference between "motivating factor" as used by this Court and "significant factor" as used by the District Court of Appeal in this case or even "sub-

stantial factor" referred to by Petitioners.

Petitioners' alleged conflict with this Court's decision in Arlington Heights is not one of law but of semantics.

4. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THE CIRCUIT COURTS OF APPEAL

Petitioners assert in their Petition that there is a conflict amongst the Circuit Courts of Appeal because the Fifth Circuit Court of Appeal is the only circuit which has adopted "the 'substantial factor' test."

Petitioners further assert that this standard was first enunciated in United States v. Pelzer Realty Co., Inc., 484 F.2d 438 (5th Cir. 1973, cert. denied, 416 U.S. 936 (1974).

The standard described by the court in Pelzer was the significant factor test

and not the substantial factor test. Petitioners, by their own misstatements, appear to be creating conflicts that do not exist.

Moreover, Petitioners obfuscate the issue in this case when in footnote 2 in their Petition they submit that "'a motivating factor' and 'a factor' are in essence the same standard, and that they each represent a standard quite different from that of 'a substantial factor.'"

As noted by the District Court of Appeal in this case:

> "Cases involving the Fair Housing Act, . . . are not consistent in their terminology. Many Fifth Circuit cases continue to use 'a significant factor' or 'one significant factor', e.g., Woods-Drake v. Lundy (1982) 667 F.2d 1198 which lists other cases using that phrase. Other courts use 'a motivating factor' or 'competing consideration', e.g. Atkins v. Robinson (DCA Va. 1982) 545 F.Supp. 852; United States v. City of Parma, Ohio (1981) 661 F.2d 562; United

"States v. City of Birmingham, Mich. (1982) 538 F.Supp. 819. Still others employ the terms 'a part', 'any part', 'a consideration', 'some role', or 'an element', e.g., Bishop v. Pecsok (Ohio 1976) 431 F. Supp. 34; Jordan v. Dellway Villa of Tenn., Ltd. (6th Cir. 1981) 661 F.2d 588; United States v. Mitchell (5th Cir. 1978) 580 F.2d 789, 791; Zuch v. Hussey, supra, 394 F.Supp. 1028; Shaw v. Cassar (E.D. Mich. 1983) 558 F.Supp. 303.

A close reading of the cases cited reveals that almost all hark back to Smith v. Sol D. Adler Realty Company, supra, or more recently to Arlington Heights, supra. Moreover, the persuasive theme in all the cases (even those in the suspect Fifth Circuit) is that race is an impermissible consideration in a real estate transaction (Moore v. Townsend (7th Cir. 1975) 525 F.2d 482, 485) and that race need not be the sole motivating factor in a denial that has discriminatory effect in order for plaintiff to succeed in a claim under the Fair Housing Act (Robinson v. 12 Lofts Realty, Inc. (2nd Cir. N.Y. 1979) 610 F.2d 1032, 1042). A denial violates the statute if race is even one of the motivating factors. (Ibid.)"

5. THIS CASE DOES NOT PRESENT AN IMPORTANT QUESTION OF NATIONAL SIGNIFICANCE BECAUSE THIS CASE WAS DECIDED ON A PARTIAL RECORD; FURTHER, CALIFORNIA HAS ITS OWN HOUSING DISCRIMINATION ACT

Petitioners argue that this case presents an important question of national significance in the area of federal civil rights law.

Yet Petitioners fail to point out that this case was decided in the District Court of Appeal on a partial record only, thereby significantly diminishing this case's importance and significance. One of the items that was not included in the record on appeal was the trial testimony of Respondents Ruth Drain and Vincent Drain.

Further, California has its own housing discrimination act which states in pertinent part:

"It shall be unlawful:

(a) For the owner of any

"housing accommodation to discriminate against any person because of the race, color, religion, sex, marital status, national origin, or ancestry of such person.

(b) For the owner of any housing accommodation to make or to cause to be made any written or oral inquiry concerning the race, color, religion, sex, marital status, national origin, or ancestry of any person seeking to purchase, rent or lease any housing accommodation . . . ."

California Government Code section 12955

42 U.S.C. §3610(d) of the Federal Fair Housing Act provides, in pertinent part:

". . . no such civil action may be brought in any United States district court if the person aggrieved has a judicial remedy under a State or local fair housing law which provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this sub-chapter. . . . ."

Since California Government Code §12955(a) and (b) is substantially equivalent to 42 U.S.C. §3604(a), under 42 U.S.C. §3610(d), it is questionable whether this case was properly brought under the Federal Fair Housing Act. See, e.g., McLaurin v. Brusturis, (1970) 320 F.Supp. 190 (D.C. Wis.); Colon v. Tompkins Square Neighbors, Inc., (1968) 289 F.Supp. 104 (D.C.N.Y.); Denny v. Hutchinson, (1981) 649 F.2d 816 (C.A. Col.).

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS R. SHERIDAN
Attorney for Respondents

# APPENDICES

149 Cal.App.3d 484

BOB JONES doing
business as BOB
JONES REALTY,
PLAINTIFF and
RESPONDENT

v.

VINCENT DRAIN and
RUTH DRAIN, DEFENDANTS
and APPELLANTS.

Civ. 67286

Court of Appeal,
Second District
Division 6

December 2, 1983

Hearing Denied
February 16, 1984

Appendix A

FACTS

STONE, Presiding Justice.

The appellants entered into an exclusive listing contract with Sears Realty for the sale of their home in Santa Barbara County. Sears Realty entered into an oral contract with respondent, Bob Jones Realty, in which the respondent agreed to act as a cooperative broker to find a purchaser for the Drain property. Bob Jones located a potential purchaser that submitted an offer on July 28, 1978. This offer was rejected because of potential adverse tax consequences for the Drains.

On August 24, 1978, the appellants received an oral offer from David Boggs which was accepted. The parties agreed to meet August 29, 1978, to reduce the agreement to writing. In the meantime, the Drains received written offers from a purchaser obtained by Bob Jones Realty.

These offers were rejected because the Drains had previously agreed to sell the property to Boggs.

Bob Jones Realty and its purchaser, the Masins, filed suit against the Drains and Sears Realty alleging: (1) Housing Discrimination, (2) Misrepresentation, (3) Breach of Contract, and (4) Declaratory Relief. The first two causes of action were decided at trial in favor of Sears Realty and the appellants, the Drains. The trial court granted summary judgment on the third and fourth causes of action in favor of the appellants and Sears Realty.

The fourth cause of action was appealed to this court and the ruling of the trial court was affirmed. (See Masin v. Drain, 150 Cal.App.3d 714, 198 Cal.Rptr. 367.) However, Vincent and Ruth Drain have brought this appeal contesting the trial court's order

taxing the attorney's fees request from its memorandum of costs.

ANALYSIS

The sole issue on appeal is whether or not the trial court correctly denied the appellants' claim for attorneys' fees.

The appellants argue that Civil Code section 1717 provides authority for the attorney's fees award. That section states in pertinent part: "(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of that contract, shall be awarded eitner to one of the parties or to the prevailing party, then the party who is determined to be the prevailing party, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to costs and

necessary disbursements." It is the appellants' contention that since the respondent brought suit against the Drains for breach of contract which contained an attorney's fee provision, that the appellants should be able to recover their legal fees as the prevailing party. The respondent asserts that the Drains should not be allowed to recover their costs because the trial court found, as a matter of law, that no contract existed between Bob Jones Realty and the Drains.

The issue by the respondent was considered in the case of Babcock v. Omansky (1973) 31 Cal.App.3d 625, 107 Cal.Rptr. 512. In that case a wife was sued for breach of four promissory notes executed by her husband. The court held that the wife was not a party to the notes and that the breach of contract action brought by the plaintiff was

without merit. The wife, as the successful party to the litigation, was granted attorney's fees and costs pursuant to Civil Code section 1717 because the plaintiff, in the underlying action, had sought to recover attorney's fees under the provisions of the promissory note contract. The court in ruling for the wife stated: "As the language of the statute expressly indicates, a party need not be a signatory to the contract in order to recover attorney's fees as the prevailing party--as such prevailing party he becomes entitled to fees 'whether he is the party specificed in the contract or not.'"

This issue was also considered in Care Construction, Inc. v. Century Convalescent Centers (1976) 54 Cal.App. 3d 701, 126 Cal.Rptr. 761. In Care the defendant was sued for breach of a lease contract and successfully defended its

case on the theory that the laws was invalid. The court in awarding the defendant attorney's fees stated: "To summarize, we hold that where there is an action on a purported lease which contains a provision for attorney's fees for the lessor that the lessee is entitled to attorney's fees under Civil Code, section 1717, if he succeeds in defending on the theory that there was no valid or enforceable lease."

The seminal case dealing with attorney's fees on contract causes of action is Reynolds Metal Co. v. Alperson (1979) 25 Cal.3d 124, 158 Cal.Rptr. 1, 599 P.2d 83. In that case the California Supreme Court held that "Section 1717 was enacted to establish mutuality of remedy where a contractual provisions makes recovery of attorney's fees available for only one party." (supra, p. 128, 158 Cal.Rptr. 1, 599 P.2d

83.) The court went on to state, "Its purposes require section 1717 be interpreted to further provide a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the defendant." (supra, p. 128, 158 Cal.Rptr. 1, 599 P. 2d 83.) (Emphasis added.)

The critical issue to be addressed in this case is whether or not the plaintiff, Bob Jones Realty, clearly would have been entitled to attorney's fees had it prevailed in enforcing the contract against the defendants Drains.

In considering the question of the clarity of the entitlement to attorney's fees we must decide whether this issue is to be resolved based upon the pleadings or based upon the evidence. We believe that the issue must turn on the

pleadings.

The respondent's third cause of action against the appellants was for breach of a written contract containing an attorney's fees provision. The appellants prevailed on this cause of action when their motion for summary judgment was granted and the respondent failed to appeal the ruling. Consequently, the appellants satisfied all of the elements set forth in Civil Code section 1717 for the recovery of attorney's fees.

The respondent argues there was no possibility that it could have recovered attorney's fees against the appellants because the respondent was not a party to or a beneficiary of the contract. This argument is disingenuous to say the least. The essence of the respondent's position is that its cause of action was so devoid of merit that there was

no possibility that it ever could have prevailed. As a consequence, the respondent contends that there was no likelihood that it could ever obtain a judgment for breach of contract and as a result, it could never obtain an award of attorney's fees against the appellants. Given this scenario, the respondent asserts that the mutuality of attorney's fees provision of Civil Code section 1717 should not be involved.

The respondent cites several cases which it asserts supports its position. The first of these is Canal-Randolph Anaheim, Inc. v. Wilkoski (1978) 78 Cal. App.3d 477, 144 Cal.Rptr. 474. In that case the court stated: "Moreover, even where a contractual provision for recovery of attorney fees is one-sided and Civil Code section 1717 applies, recovery of and liability for attorney fees

is restricted to parties to the contract. (Arnold v. Browne (1972) 27 Cal.App.3d 386, 398, 103 Cal.Rptr 775; Boliver v. Surety Co. (1977) 72 Cal.App.3d Supp. 22 at pp. 28-29, 140 Cal.Rptr. 259.) To the extent the decision in Babcock v. Omansky (1973) 31 Cal.App.3d 625, 107 Cal.Rptr. 512, indicates the contrary, it is incorrect . . ." (Canal-Randolph Anaheim, Inc. v. Wilkoski, supra, 78 Cal.App.3d p. 485, 144 Cal.Rptr. 474.)

The respondent's reliance upon Canal-Randolph is misplaced. The Canal-Randolph court relied exclusively upon the Arnold and Boliver cases to support its proposition that one must be a party to the contract to recover attorney's fees under Civil Code section 1717. The Arnold case was expressly disapproved by the California Supreme Court in Reynolds Metals Co. v. Alperson, supra, 25 Cal.3d

124, 129, 158 Cal.Rptr. 1, 599 P.2d 83. Furthermore, the Reynolds court also endorsed the holding of Babcock v. Omansky [Citation.] which the Canal-Randolph court so vigorously disapproved. The language of Reynolds clearly indicates that the reasoning of Babcock is the correct analysis. "Had plaintiff prevailed on its cause of action claiming defendants were in fact the alter egos of the corporation [Citation.], defendants would have been liable on the notes. Since they would have been liable for attorney's fees pursuant to the fees provision had plaintiffs prevailed, they may recover attorney's fees pursuant to section 1717 now that they have prevailed." (Reynolds Metals Co. v. Alperson, supra, 25 Cal.3d 124, 129, 158 Cal.Rptr. 1, 599 P.2d 83.)

The respondent relies heavily upon

Boliver v. Surety Co., supra, 72 Cal.App.3d Supp. at p. 22, 140 Cal.Rptr. 259. This case rejects the Babcock analysis in favor of Arnold v. Browne, supra, 27 Cal.App.3d 386, 103 Cal.Rptr. 775. Given the Supreme Court's disapproval of Arnold and the adoption of Babcock in the Reynolds case, the Boliver holding provides little, if any, support for the respondent.

Star Pacific Investment, Inc. v. Oro Hills Ranch, Inc. (1981) 121 Cal.App.3d 447, 176 Cal.Rptr. 546 was also cited by respondent. The court in that case incorrectly adopted the position that recovery of attorney's fees under Civil Code section 1717 must be limited to the parties to the contract. This holding is in direct contradiction to the Babcock and Reynolds cases.

The respondent also places a great

deal of reliance on Saucedo v. Mercury Savings & Loan (1980) 111 Cal.App.3d 309, 168 Cal.Rptr 552. The Saucedo court erroneously attempts to draw a distinction between parties to the contract and parties to the litigation based on the contract. Nevertheless, the court in Saucedo reiterated an equitable estoppel theory first set forth in Pas v. Hill (1978) 87 Cal.App.3d 521, 151 Cal.Rptr. 98, which runs completely contrary to the respondent's position. The court stated, in concurring that the result in the Babcock case was correct, that "[t]he plaintiffs having alleged and attempted to prove the defendant wife was a party to the notes as a joint venturer and that she was liable under the notes' attorney fee provisions and having caused defendant wife to defend against such liability,

were estopped to deny defendant wife was a party to the contract for the remedial purposes of Civil Code section 1717." (Pas v. Hill, supra, 87 Cal.App.3d at 535-536, 151 Cal.Rptr. 98.)

What the respondent ignores is that had it prevailed in its cause of action against the appellants it would have been entitled to attorney's fees. This issue became somewhat obscured in the trial court because of the fact that the respondent's case was so completely without merit. However, even though the respondent possessed no evidence to support its cause of action it was capable of alleging sufficient facts in its pleadings to force the appellants to wage a defense.

The courts have consistently held that the award of Civil Code section 1717 contractual attorney's fees is to be

governed by equitable principles. (International Industries, Inc. v. Olen (1978) 21 Cal.3d 218, 145 Cal.Rptr. 691, 577 P.2d 1031; Lewis v. Alpha Beta Co. (1983) 141 Cal.App.3d 29, 189 Cal.Rptr. 840.) We believe that it is extraordinarily inequitable to deny a party who successfully defends an action on a contract, which claims attorney's fees and costs simply because the party initiating the case has filed a frivolous lawsuit. As a consequence, we find that a prevailing defendant sued for breach of contract containing an attorney's fees provision and having had to defend the contract cause of action, is entitled to recover its own attorney's fees and costs therefor, even though the trial court finds no contract existed.

The judgment of the trial court in regards to attorney's fees is reversed

and remanded for a hearing to determine the appellants' attorneys' fees and costs.

ABBE and GILBERT, JJ., concur.

150 Cal.App.3d 714

JOSEPH MASIN and
EVA MARIA MASIN,
husband and wife,
et al., Plaintiffs
and Appellants,

v.

VINCENT DRAIN and
RUTH DRAIN, husband
and wife, et al.,
Defendants and
Respondents.

Civ. 67347

Court of Appeal,
Second District,
Division 6

January 10, 1984

Hearing Denied
April 18, 1984

APPENDIX B

STONE, Presiding Justice.

Bob Jones Realty, the plaintiff below and appellant herein appeals from an order of the Santa Barbara Superior Court granting respondent Sears Realty's motion for summary judgment.

FACTS

This case involves Bob Jones Realty's attempt to obtain a portion of the commission paid to Sears Realty for the sale of a home in Santa Barbara County. The appellant contends that it is entitled to this commission because it produced a ready, willing and able purchaser prior to the date on which the property was sold.

On April 12, 1978, Ruth Drain entered into an exclusive listing contract with the respondent, Sears Realty, to sell her home. Appellant, Bob Jones Realty, worked as a cooperative broker with Sears Realty and showed the Drain

property to the Masins, who were German nationals. The Masins liked the Drain home and submitted an offer on July 28, 1978, which was rejected because the terms offered had negative tax consequences for the seller.

The Drains were concerned about the tax ramifications of selling their home in 1978 and therefore required that any offer to purchase the property meet the following conditions: (1) An option to purchase would be executed, to be exercised on or after January 1, 1979; (2) Option price would be one hundred thousand dollars ($100,000.00) cash, to be applied to purchase price; (3) Escrow would not open prior to January 1, 1979; and (4) All documents would be prepared by attorneys for Mrs. Drain and approved by Sears Realty and Mrs. Drain's tax attorneys.

On August 24, 1978, the Drains met

with David Boggs who offered to purchase the property and agreed to the terms and conditions set forth above. The Drains and Boggs entered into an oral option contract for the sale of their property and agreed to reduce the contract to writing on August 26, 1978. On August 26, 1978, agents for Bob Jones Realty delivered a written offer to purchase the Drain property to Sears Realty. This offer was rejected because the Drains had already accepted the Boggs' offer. A virtually identical offer was personally delivered to Vince Drain on August 28, 1978. This offer was also rejected.

The appellant and the Masins filed suit against Sears Realty and the Drains alleging: (1) Housing Discrimination, (2) Fraudulent Misrepresentation, (3) Breach of Contract, and (4) Declaratory Relief. A motion for summary judgment was filed by Sears Realty on the fourth

cause of action, which was granted. Bob Jones Realty appeals the trial court's ruling on this issue.

The declaratory relief cause of action required that the trial court determine Bob Jones Realty's rights to the commission paid to Sears Realty pursuant to the listing contract. The respondent, Sears Realty, filed a motion for summary judgment against this cause of action based upon two theories. First, it contended that the Drains had entered into an oral option contract prior to receiving the Masin offers. Secondly, it argued that the offers were invalid and unenforceable because of their failure to comply with the statute of frauds. The trial court did not specify which theory it accepted in granting the summary judgment. The appellant examines both issues on appeal.

THE AUGUST 26 and 28 OFFERS

The appellant contends that it is entitled to share in the commission for the sale of the Drain property because it produced a ready, willing and able buyer prior to the creation of the option contract with David Boggs. The appellant does acknowledge that, "had the Drains sold the property to Boggs prior to the written offers to purchase by Eva Masin on August 26 and 28, 1978, Bob Jones Realty would not be entitled to any portion of the broker's commission."

In analyzing the trial court's actions in granting a summary judgment motion we must review all of the documents attached to the moving papers. (Jacobs v. Retail Clerks Union, Local No. 1222 (1975) 49 Cal.App.3d 959, 123 Cal.Rptr. 309). The respondents' motion contained declarations of Ruth Drain, Arthur Bromfield and Ann Little. Mrs.

Drain's declaration specifically asserts the existence of an oral contract with Boggs on August 24, 1978. The declarations of both Bromfield and Little, who are agents for Sears Realty, indicate that they were informed on August 25, 1978, that an oral option contract for the sale of the Drain property had been made.

The fact that the option contract was oral does not invalidate the agreement. The statute of frauds, set forth in Civil Code section 1624, has not been interpreted as making such agreement null and void. It is the general rule that a contract falling within the operation of the statute, but made in contravention thereof, is not invalid in the sense that it is void. It is merely voidable. The statute is said to relate to the remedy only and not to affect the validity of the oral contract. (Offeman

v. Robertson-Cole Studios, Inc. (1926) 80 Cal.App. 1, 12, 251 P. 830; Warder v. Hutchison (1924) 69 Cal.App. 291, 295, 231 P. 563; Durbin v [illegible]man (1920) 50 Cal.App. 377, 379, 195 P. 274; O'Brien v. O'Brien (1925) 197 Cal. 577, 586, 241 P. 861.)

When affidavits in support of a motion for summary judgment state facts which would sustain a judgment and counter affidavits do not contradict them, summary judgment is proper. (City of Los Angeles v. City of Artesia (1977) 73 Cal.App.3d 450, 140 Cal.Rptr. 864). The affidavits submitted by the appellant in opposition to the summary judgment motion contained only the declaration of Paul O'Keeffe and Lawrence Linn. These brokers declared that the agents for the Drains continued to negotiate the sale of the property on August 26, 1978.

The appellant contends that Sears

Realty's efforts in continuing to facilitate a sale to the Masins raises the inference that an option contract for the sale of the property was not actually created on August 24, 1978. The appellant argues that the existence of this inference raises a triable issue of fact. If a material factual issue was before the court at the time the summary judgment was granted reversible error was committed. (Fosgate v. Gonzales (1980) 107 Cal.App.3d 951, 166 Cal.Rptr. 233).

We do not believe that the appellant has been successful in demonstrating the existence of a triable issue of fact. Although the appellant has admitted affidavits indicating that Sears Realty continued to negotiate a sale of the Drain property on August 26, 1978, this evidence does not refute Ruth Drain's

declaration that an oral option contract was created on August 24, 1978. The appellant did not demonstrate that the Drains had any knowledge of the acts of Sears Realty. Furthermore, the appellants clearly have not presented evidence that Sears Realty was instructed by the Drains to continue negotiations.

Therefore, even when we accept the facts alleged in the appellant's affidavits as being true, as required by Blaustein v. Burton (1970) 9 Cal.App.3d 161, 88 Cal.Rptr. 319, the most the appellant can prove is that Sears Realty continued to act independently after the August 24, 1978 oral option contract was created. This fact, in and of itself, is insufficient to rebut the respondent's evidence that the property was sold August 24, 1978. Therefore, we conclude that the Drain property was effectively removed from the market

prior to the receipt of the August 26 and 28 offers from Bob Jones Realty's purchasers, the Masins. In light of this fact the appellant, Bob Jones Realty could not be entitled to any commission. As a consequence, the trial court correctly granted the motion for summary judgment.

The judgment of the lower court is affirmed.

ABBE and GILBERT, JJ., concur.

Hearing denied; MOSK, J. dissenting.

## PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, January 9, 1986, I served the within RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI in re. "Joseph Masin and Eva Maria Masin vs. Vincent Drain and Ruth Drain" in the U.S. Supreme Court, October Term, 1985, No. 85-985,

on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

FRANCES E. KOMOROSKE
831 State Street
Santa Barbara, CA 93101

All parties required to be served have been served.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.
Executed on January 9, 1986
at Los Angeles, California.

Kathlee Kattenbach

Supreme Court, U.S.
FILED
FEB 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-985

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

JOSEPH MASIN and EVA MARIA MASIN,

Petitioners,

vs.

VINCENT DRAIN and RUTH DRAIN,

Respondents.

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT,
DIVISION SIX

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# PETITIONERS' REPLY MEMORANDUM

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT,
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---

**PETITIONERS' REPLY MEMORANDUM**

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Respondents in their opposing brief attempt to obfuscate what is in fact a simple question: Was the jury correctly instructed as to applicable federal law on housing discrimination? Implicit in

their response is the belief that so long as discrimination does not rise to the level of ordering blacks to ride in the back of the bus, then it is socially and legally acceptable. This, however, is not the law.

Respondents first rely on the procedural history of the case and two related appeals as purported evidence that this Petition lacks merit.[1/] While these may be of some academic interest to the Court, they are not relevant to its determination of whether certiorari should be granted.

Respondents' next argument is that the issue presented in this Petition was

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1. Respondents incorrectly state that no review of two related decisions of the Court of Appeal was sought by petitioners. However, petitions for rehearing were filed in both appeals, as were petitions for hearing with the California Supreme Court. Respondents also neglect to inform this Court that a petition for rehearing was in fact granted by the Court of Appeal in Joseph Masin and Eva Maria Masin v. Vincent Drain and Ruth Drain, Civil Case No. 67347.

allegedly not raised in the Court of Appeal and therefore cannot now be. The basis for this argument borders on the frivolous: Respondents argue that while petitioners objected to the word "significant" in the challenged jury instruction, the Petition filed with this Court instead used the word "substantial." Respondents are well aware that Petitioners have at all times used the terms "significant" and "substantial" interchangeably and have argued that the two terms have virtually identical meanings.[2/]

Petitioners have at all times stressed to the trial and appellate courts that "a factor" represents a standard completely separate and

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2. This point is impliedly conceded by Respondents in their opposition as they define both terms as meaning "important". However, for purposes of clarity, the word "significant" will be used throughout this brief.

distinct from "a significant factor."[3/] The two standards represent a difference in degree, and a subjective weighing is required to determine whether "a factor" rises to the level of being something other than trivial or unimportant.

A simple analogy may help elucidate this critical point. While no doubt many of the petitions for writ of certiorari filed with this Court contain numerous issues, not all of those issues can be termed "significant". Rather, a subjective evaluation is required to determine into which category each falls, with those petitions not raising significant issues being rejected.

Respondents' third argument is that the Petition is somehow defective since the various rejected offers have been

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3. It is Petitioners' position that "a factor" and "a motivating factor" are one and the same as "a factor" is obviously something which "motivates" a person to commit a particular act.

analyzed as a whole rather than as distinct entities. This argument ignores the fact that it is irrelevant which of the several offers to purchase were rejected by Respondents as the overall, consistent reason for the Respondents' refusal to sell was the Petitioners' national origin and the Respondents' dislike of it.

Similarly, the reason now advanced by Respondents for their failure to sell the residence, i.e., that a prior sale had been made to a third party, is not dispositive of the issue presented in this Petition. As Petitioners have strenuously argued throughout these proceedings, the "prior sale" was concocted by Respondents and their agents to protect them from liability for illegal

acts of discrimination.[4/] Thus, that an appellate court found that a prior sale justified the Respondents' refusal to sell only serves to illustrate the error which was committed.

Respondents next argue that the Court of Appeal decision is in conflict with neither the decision of this Court in Village of Arlington Heights v. Metropolitan Housing Dev. Corp. 429 U.S. 252 (1977), nor with decisions of various circuit courts of appeal. Given the Respondents' position that there is no distinction between "a

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4. It is precisely such acts which have led the courts to stress that suggested reasons advanced by defendants for failing to sell or rent property "must be carefully scrutinized" as "clever men may easily conceal their motivations". "As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find." Thus, when a discriminatory effect is present, "the courts must be alert to recognize means that are subtle and explanations that are synthetic." (Robinson v. 12 Lofts Realty, Inc. 610 F.2d 1032, 1040, 1043. (2nd Cir. 1979.)

factor" and "a significant factor," it is hardly surprising that they would see no conflict. However, Petitioners submit that it is neither accident nor coincidence that the various courts have adopted the conflicting terminology which is at issue. The problem is neither one of semantics nor of inartful drafting, as Respondents imply.

The next argument advanced by Respondents is unique; they argue that this case necessarily cannot present an important question of national significance because it was decided on a partial record. The connection between these two concepts is nebulous at best, and Respondents fail to illuminate how a transcript of all thirteen days of this trial would transform the case into one "of national significance."

However, any burden which exists due to the nature of the record was of Respondents' own making. As set forth

in Petitioners' Opposition to Motion to Augment Reporter's Transcript and Extend Time to File Respondents' Brief, augmenting the record would have required an additional two years, six years had already elapsed since Respondents had refused to sell the residence, and Respondents were unable to justify their failure to take advantage of the numerous opportunities to augment the record. Thus, the Court of Appeal correctly denied Respondents' motion.

Respondents' final argument also presents a serious question as to waiver. While it is true that California has its own law on housing discrimination, Petitioners chose to pursue relief through the Federal Fair Housing Act rather than the California Fair Employment and Housing Act. The propriety of doing so was argued during trial and it was then determined that

jurisdiction was proper under federal law. As Respondents never challenged this decision, they are prevented from doing so now.

In conclusion, the Court is respectfully requested to note Respondents' failure to directly address the issue presented in this Petition. Perhaps Respondents agree with the position adopted by the trial court and believe that discrimination should be accepted as a fact of life. To people such as those, "a little discrimination" is always acceptable because it is always unavoidable.

While it may be, as the trial court noted, "practically impossible to eliminate bias from the whole human context", that is in fact the very purpose of the Federal Fair Housing Act. This purpose is effectively thwarted by any standard which requires a conclusive showing of blatant bigotry, as does the standard

adopted by the trial court. Petitioners therefore respectfully urge that certiorari be granted to review that standard.

Respectfully submitted,

A. BARRY CAPPELLO

FRANCES E. KOMOROSKE,
Attorneys for Petitioners

February 4, 1986.